

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 99-06196-WRS  
Chapter 13

LEWIS E. HULETT, JR.  
PHOEBE R. HULETT,

Debtors.

In re

Case No. 98-02554-WRS  
Chapter 13

ANGEL JOHNSON  
EDWARD C. JOHNSON,

Debtors.

**Memorandum Decision**

The Court has before it motions filed in two unrelated bankruptcy cases which raise essentially the same issue. In each Chapter 13 case an order of discharge entered, but due to an administrative error, a timely filed claim was not paid prior to discharge. The issue now before the Court is whether to set aside the discharge to provide for the payment of these claims. The Court will consolidate the motions for consideration, but will enter a separate order on each motion.

**I. Facts**

**A. *In re* Hulett**

In this case, the Trustee filed a motion styled, "Trustee's Motion to Set Aside Order Discharging Debtors' Case and Order Discharging Trustee and Motion to Withdraw Trustee's Final Report and Accounting" on October 17, 2003. (Doc. 38). The motion was called for telephonic hearing on November 18, 2003. Sabrina McKinney was present for the trustee. David Poston,

counsel for the Debtors, appeared telephonically.

The Court's record shows that Max Flow Corporation timely filed a proof of claim in this case. Max Flow filed their unsecured claim for approximately \$8,000.00. The proof of claim was received by the Court and stamped filed on February 25, 2000; however, it was never transmitted to the Trustee's Office. Because the claim was never received by the Trustee, the creditor did not receive the 70% dividend for unsecured creditors in this case. After payment of all the claims he had received, the Trustee filed the Final Report and Accounting (Doc. 33), and the Court entered an order of discharge on August 25, 2003. (Doc. 34). Thereafter, the creditor alerted the Trustee that it had not received any payment on its claim.

#### **B. *In re* Johnson**

In this case, on November 26, 2003 creditor ECA Federal Credit Union filed a motion styled, "Motion to Set Aside Discharge." (Doc. 58). The motion was called for hearing on January 14, 2004 at the United States Bankruptcy Court, Opelika, Alabama. Britt Griggs, counsel for the creditor, Sabrina McKinney, counsel for the Chapter 13 Trustee, and Charles Ingram, counsel for the Debtors, were present for the hearing.

The evidence shows that the creditor in this case timely filed a proof of claim in the amount of \$1,656.32. By agreement of the parties, the claim was to be specially classed in the amount of \$824.18 at 14.75% interest. The Court entered an order on the joint stipulation of the parties on July 31, 1998. (Doc. 19). However, it appears that this claim was not properly loaded into the Trustee's computer system and as a result, the creditor received no disbursement. After payment of all the claims

in his system,<sup>1</sup> the Trustee filed the Final Report and Accounting (Doc. 30), and the Court entered an order of discharge on December 12, 2002. (Doc. 52). ECA Federal Credit Union discovered the error when its counsel was checking the status of various cases in this Court.

## **II. Legal Conclusions**

In both cases, the order of discharge was entered by this Court under a misapprehension of the facts of the case. Specifically, the Court believed that all timely filed claims had been paid according to the terms of the confirmed Chapter 13 Plans at the time the discharge orders entered. There is no evidence that the debtors in either case obtained their discharge through fraud. See 11 U.S.C. § 1328(e).

Counsel for the Johnsons argues that Section 1328(e) governs the instant situation and that because there has been no fraud on the part of the Debtors, the order of discharge cannot be revoked. Section 1328(e) provides:

- (e) On request of a party in interest before one year after a discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if—
  - (1) such discharge was obtained by the debtor through fraud; and
  - (2) the requesting part did not know of such fraud until after such discharge was granted.

11 U.S.C. § 1328(e). In the Court's view the import of this section is

as a means of emphasizing that other ground for revocation—whether general equitable principles or some reason set forth in section 727(d), which governs revocation of a discharge granted in a Chapter 7 proceeding— are not to be imported into the Chapter 13 context. . . .A Chapter 13 debtor's right to have his discharge revoked only for fraud . . . is in no way infringed when a court vacates an order of discharge entered by mistake.

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<sup>1</sup>Unsecured claims received a 0% dividend in this case.

In re Cisneros, 994 F.2d 1462, 1466 (9th Cir. 1993).

In Cisneros, the IRS timely filed a proof of claim in the debtors' bankruptcy case. The confirmed plan provided for monthly payments of \$3,388.00 to the IRS. However, these payments were not made because the Trustee never received notice from the clerk's office of the IRS's proof of claim. After the Trustee had paid all the claims of which she was aware, she issued a Final Report and Accounting. In reliance on that report, the Bankruptcy Court granted the debtors a discharge. Thereafter, the IRS moved the Court to vacate the order of discharge. Cisneros, 994 F.2d at 1464.

The Court held a hearing on the government's motion to vacate and sua sponte raised the issue of whether it could vacate the discharge pursuant to Federal Rule of Civil Procedure 60(b). Id.; see FED. R. CIV. P. 60(b), made applicable to bankruptcy proceedings by FED R. BANKR. P. 9024 (stating in relevant part "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect").

As a preliminary matter, the Court noted that the debtors in Cisneros failed to meet statutory requirements of Section 1328(a). Cisneros, 994 F.2d at 1465-66; see 11 U.S.C. § 1328(a) (requiring "completion by the debtor of all payments under the plan"). As such, the Court reasoned they could not "claim any right to the discharge granted them." Id. at 1466. The Court went on to hold that there was no conflict between Section 1328(e), which allows revocation of discharge only for "fraud," and Rule 9024, which allows a court to correct its own mistakes. Id. The Court found that the discharge order was entered under a misapprehension of the facts and was "precisely the sort of 'mistake' or 'inadvertence' that Rule 60(b) was intended to reach." Id. at 1467. Other courts have limited the

holding in Cisneros to the proposition that a court has the inherent power to correct its own mistakes. See e.g., In re Daniels, 163 B.R. 893, 897 (Bankr. S.D. Ga. 1994) (citing In re Ford, 159 B.R. 590, 593 (Bankr. D. Or. 1993)).

In the cases at bar, this Court reaches the same conclusion and finds that the errors made are of the type contemplated by Rule 60(b). In both cases, due to a clerical mistake, a timely filed claim was not paid prior to discharge. Further, the record shows that the claimants were not responsible for the mistake. Cf. In re Daniels, 163 B.R. at 897-98 (creditor who mistakenly filed proof of claim in the amount of \$0.00 not entitled to have debtors' discharge revoked). In both cases, the motions were filed within one year after entry of the order of discharge. See FED. R. BANKR. P. 9024 (requiring motion to be made not more than one year after the order). Accordingly, the Court will exercise its powers under Rule 60(b) to correct the mistakes that occurred when timely filed claims were not paid prior to entry of the order of discharge. The Court will enter a separate order on each motion.

Done this 5<sup>th</sup> day of March, 2004.

/s/ William R. Sawyer  
Chief United States Bankruptcy Judge

c: Curtis C. Reding, Trustee  
David G. Poston, Esq.  
Charles M. Ingram, Jr., Esq.  
Britt B. Griggs, Esq.